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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1052

NORMA MOONEY,
Petitioner,
v.
STAINLESS, INC., et al.,
Respondents.

BRIEF

Of Respondents in Reply to the Petition for a Writ of Certiorari.

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STATEMENT OF THE CASE.

As noted at page ten of the petition, this case presents only sufficiency-of-the-evidence questions on two issues: (1) negligence of the respondent, and (2) whether the employer of petitioner's husband bore the relationship of employee or that of sub-contractor to the respondent. It does not, as the petitioner suggests, raise the question of whether a state or Federal standard should be applied, for here the standard of the state (Tennessee) and the Federal standard is the same. Any consideration of the sufficiency questions will require a review of all the proof

to determine whether any substantial evidence to support the jury's verdict in favor of the petitioner is to be found. The Court of Appeals found none. In our reply to the two specific questions presented we shall refer to certain portions of the record omitted from petitioner's statement.

REASONS FOR NOT GRANTING THE WRIT.

I.

General.

Before any detailed discussion of either of the questions is undertaken, it should be noted that each is of the when-are-you-going-to-stop-beating-your-wife variety. Thus, the first question asks in part whether the Court of Appeals erred in failing to apply the Tennessee standard to the sufficiency question in contravention of the rule of **Erie R. Co. v. Tompkins**, 304 U. S. 64. As will become apparent, the Court of Appeals did apply the Tennessee standard, and it is immaterial whether that standard or the Federal standard was applied because they are the same. And the second question asks in part whether the Court of Appeals erred in substituting its opinion for the verdict of the jury, when in fact it is apparent that the Court of Appeals did not do so but found that there was no substantial evidence to support the verdict. Also, the second question presupposes that if the record contained sufficient evidence to support a finding that an employer-employee relationship existed between the respondent[1] and its subcontractor, the petitioner would be permitted by the law of Tennessee to maintain what in effect is a common law action for damages brought by an employee against his employer while the employee is receiving workmen's compensation benefits as provided for him by his employer under the

[1] The respondents were treated as one defendant in this case and will be referred to as "respondent" here.

law of Illinois. The Court of Appeals agreed with the petitioner that under the holding of **Carroll v. Lanza**, 349 U. S. 408, 99 L. Ed. 1183, the law of Tennessee, where the injury occurred, and not Illinois law would govern the question. The Court of Appeals then held that the action would not be permitted under Tennessee law. The petitioner proceeds on the assumption that the latter holding is incorrect. While we believe that it is correct, we shall not discuss the holding but shall consider only the sufficiency of the evidence questions, because no other questions are presented to the Court by the petition. For the same reason, and although we do not agree with the petitioner, we shall refrain from replying to other criticisms of the action of the Court of Appeals which are contained in the petition but which are immaterial to the sufficiency of the evidence questions.

The petitioner contends that the Court should take the case for three reasons. The first is that it is important to the litigants. That is undoubtedly true, as it is true in every case which is tried in every court—state or Federal —in the land. And there is an element of sympathy in every personal injury case, and perhaps a feeling of injustice which is shared by every loser, as is touched upon in the petition; however, we must be mindful that both parties to a suit have and must continue to have equal rights at the bar. Secondly, the petitioner contends that the case is important to the Court and the entire Federal court system "because it might perhaps serve as a suitable vehicle for this Court to settle the question of what standard—state or Federal—is to be utilized in determining the sufficiency of the evidence to go to the jury where Federal jurisdiction is based upon diversity of citizenship." This cannot be a reason because the case does not involve such a question. Again, the standard of both jurisdictions is the same. Thirdly, the petitioner suggests that there has been an "erosion" of the jury-trial guaran-

tee of the Seventh Amendment, that too many jury verdicts have been set aside over the years on the ground of insufficiency of the evidence, and that the Court should use this case to "dam up this erosion." The petitioner thus suggests that the sufficiency of the evidence rule has been widely and substantially abused but does not come forward with facts or studies which would warrant such an indictment of our appellate courts.

II.

Petitioner's First Question.

The petitioner has worded this question so as to contend (a) that the Court of Appeals did not use the Tennessee sufficiency of the evidence standard and thus erred, and (b) that the Court of Appeals erred in finding that there is insufficient evidence to support the jury verdict that the respondent was guilty of independent negligence in engaging its subcontractor.

a.

The Court of Appeals Did Use the Tennessee Standard and It Is the Same as the Federal Standard.

The record demonstrates that the respondent and the petitioner proceeded both in the District Court and in the Court of Appeals on the theory that the Tennessee standard is applicable to the case. While neither party referred in either court to the Tennessee standard by name, they did, with one exception, acquiesce in the basic proposition that Tennessee law governed all issues, the exception being the respondent's contention that the Illinois Workmen's Compensation law was material in connection with the petitioner's theory that her husband's employer, the subcontractor, was not an independent contractor but an employee of the respondent. In charging

the jury on the independent contractor issue the District Court cited a Tennessee case, outlined the rules contained therein, and stated that the jury would decide the issue in accordance with those rules (R. 310a). Neither party objected. In the respondent's brief which was filed in the Court of Appeals, reference was made to Tennessee decisions on the question of whether a general verdict can stand in the face of an affirmative showing that the verdict is based on a theory which is not supported by substantial evidence (Appellant's Main Brief, p. 48). Also in its brief the respondent referred to the principles which are favorable to the petitioner under the sufficiency standard which has been used for many years in Tennessee (Appellant's Main Brief, p. 57), the principles being the same as those for which Tennessee cases are cited by the petitioner to this Court (Petition, p. 13). One of those cases was cited in the petitioner's brief in the Court of Appeals (Appellee's Main Brief, p. 31).

There is nothing in the opinions written by the Court of Appeals in disposing of the case which would indicate that it was not applying the Tennessee standard which the parties were following. The opinions evidence that it was. Thus, in discussing the sufficiency of the evidence to support the petitioner's independent negligence theory, the Court of Appeals cited Tennessee cases in agreeing with the District Court that the petitioner had the burden of proof (App. to petition, 6a).

In any event, the Tennessee sufficiency standard is the same as the Federal, so that the question of the applicability of one or the other is not involved. This was recognized by the Sixth Circuit in another case. (**Price v. Firestone Tire and Rubber Co.**, 321 F. 2d 725.) As pointed out by the petitioner, the Tennessee standard is that the appellate court does not review the evidence to determine where the preponderance lies, but only to determine whether there is any substantial evidence to support the verdict,

and in so doing it will take the strongest legitimate view of the evidence to uphold the verdict, will allow all reasonable inferences to be drawn therefrom, and will discard all evidence to the contrary. (See the cases cited at page 13 of the petition.) It might be added by way of explanation, however, that under the Tennessee standard a verdict cannot be based on conjecture and speculation, and that the scintilla rule does not obtain. (Williams v. Daniels, 48 Tenn. App. 112, 344 S. W. 2d 555, cert. den. March 10, 1961; Mutual Benefit Health, etc. Assn. v. Denton, 22 Tenn. App. 495, 124 S. W. 2d 278, cert. den. Feb. 4, 1939.) The Federal standard is the same (Improvement Co. v. Munson, 14 Wall. 442; Pogue v. The Great Atlantic & Pacific Tea Co., CCA—5, 242 F. 2d 575; Royal Indemnity Co. v. Curtis, CCA—5, 256 F. 2d 329), and it is to be noted that the petitioner does not claim that the Federal standard would be more favorable to her than the Tennessee standard.

b.

The Court of Appeals Correctly Held That There Is No Substantial Evidence to Support the Jury Finding of Independent Negligence.

There are two parts to the charge of independent negligence. The first is that the subcontractor, **at the time he was engaged by the respondent to erect the towers,** was incompetent to do the job. The second is that the respondent knew or should have known of the incompetence and was thus negligent in engaging the subcontractor.

There is no evidence of any accident or injury in which the subcontractor was involved other than the accident from which the instant case arose. The petitioner's husband had worked for the subcontractor in the tower erection and maintenance business over a period of one to one and one-half years, had worked on towers 1,000 feet or

more in height, and he was an expert in such work. A 150 foot tower such as that which was being erected when the accident occurred would be considered a small tower (R. 71a, 72a). At the time the subcontractor was engaged by the respondent, he did business as Central Illinois Tower Maintenance Company and specialized in tower erection and maintenance work (R. 194a). He had operated his company for approximately three years (R. 195a). Prior to going in business for himself, he had worked as an ironworker erecting and maintaining towers for others, including Tower Builders, Inc. of Angola, Indiana, Gardner Construction Company of Fort Wayne, Indiana, and Tower Service Company of Indianapolis, Indiana (R. 195a). He had also worked in a supervisory capacity in tower erection work (R. 260a). By way of equipment, he had three winch trucks, a pickup truck, and miscellaneous tools, rope, cable and block (R. 197a). After he started his own company, he had worked from two to as many as six or seven employees (R. 204a, 205a). At the time he solicited work from the respondent, he advised the respondent as to his experience and equipment (R. 197a, 259a).

All the evidence which pertains in any way to the question of the subcontractor's competence at the time he was engaged by the respondent thus refutes the charge of incompetence. The District Court correctly charged the jury that any negligence on the part of the subcontractor which resulted in the death of the petitioner's husband would be immaterial to the question of the subcontractor's competence at the time he was engaged by the respondent (R. 335a). The petitioner did not object to the charge. Evidence of such a single act of negligence would be insufficient to support an inference that the subcontractor was incompetent at the time the respondent engaged him. Even if the rule were to the contrary, and the single act of negligence could support an inference

of incompetence at the time of the engagement, then clearly it could not constitute substantial evidence to support the second essential part of the theory, for the respondent could hardly be charged with knowledge of something that had yet to occur.

As we understand the petitioner's argument it is that the evidence shows that the subcontractor did not have proper equipment to erect the towers at the time he was engaged. The petitioner does not suggest that there is any evidence of what equipment the subcontractor should have used on the job other than that he shouldn't have used a pickup truck and finished the job after the accident with a winch truck. He had three winch trucks when he was engaged, and so advised respondent (R. 197a).

It is interesting to note that in charging the jury the District Court included in its statement of the petitioner's theory on independent negligence that the respondent had a duty to investigate the subcontractor before engaging him (R. 360a). At the end of the charge, and in the absence of the jury, the respondent requested that the jury be charged that the respondent had no duty to make an investigation in the absence of facts which would cause a reasonable person to do so (R. 328a, 330a). The District Court did not thereafter give such a charge to the jury (R. 335a). In overruling the respondent's motion for judgment N. O. V. or in the alternative for a new trial, the District Court was apparently concerned with the question, for in the District Court's memorandum on the motion it is stated that certain additional language was charged on the point (R. 50a). If the District Court had so charged the jury, it might have helped counteract the previous statement that the respondent in effect had a duty to investigate in any event. Such a charge was not in fact given to the jury, however (R. 335a). The respondent was thus left in the eyes of the jury with a duty

to investigate regardless of the facts. It was clear in the record that the respondent, having every reason to believe that the subcontractor was competent, made no investigation. Given an unwarranted duty to investigate, and not having investigated, there is little wonder that the respondent was found liable. This question was raised on the appeal but was not reached by the Court of Appeals.

III.

Petitioner's Second Question.

With this question the petitioner contends that the Court of Appeals erred in not finding substantial evidence to support the petitioner's theory that the subcontractor was an employee of the respondent and not an independent contractor.

It would appear that the jury was also unable to find any substantial evidence to support the theory. Thus, as the Court of Appeals observed in a footnote to its opinion on the petitioner's petition to rehear (App. to petition to this Court, 13a), the jury at one point during deliberation returned into open court of its own volition and announced that it found the respondent liable on the theory of independent negligence but was unable to agree on damages (R. 338a). The District Court held that the later general verdict made it just as probable that liability was found by the jury on the theory that the subcontractor was an employee of the respondent. The Court of Appeals did not pass on the question.

The record shows beyond question that the subcontractor was an independent contractor and that the respondent did not and had no right to control him except as to the end result, that is, to erect the towers in accordance with the plans and specifications. The record shows that the

subcontractor was in the tower erection business and had his own employees, tools and equipment (R. 194a, 197a, 204a, 205a); that tower erection is a specialized business (R. 195a); that the subcontractor bid against another in the same business to erect the towers (R. 280a, 281a); that the bid was for a lump sum and covered the complete erection of the towers by the end of a stated period, with the subcontractor to furnish all labor, tools and equipment necessary for the job (R. 10a, 145a, 146a); that although the job was to be performed in accordance with plans and specifications furnished by the respondent, and the respondent reserved the right to inspect the work as it progressed to see that it was being done in accordance with the plans and specifications, it was left up to the subcontractor to determine the method or methods, of which there were several, which would be followed by him in erecting the towers (R. 157a, 266a); that the subcontractor used his own employees, tools and equipment in performing his contract, directed the details of the work and paid, and withheld income and social security taxes from his employees (R. 208a, 255a, 197a, 210a); and that the respondent at no time sought to control the subcontractor as to the details of his work but looked to him for an end result only (R. 266a, 301a, 302a, 229a, 230a).

The contentions of the petitioner in this respect do not withstand even the most cursory review. Thus, it is said that under the respondent's contract with Ferguson, the respondent was required to have a foreman or superintendent on the job. The petitioner's own witness, the head of Ferguson, testified that due to the small size of the job the requirement was waived (R. 133a, 134a). It is said that the subcontractor had to be told what to do because he had not seen the respondent's contract with Ferguson. The record shows that complete plans and specifications were furnished by the respondent to its subcontractor (R. 146a, 154a). It is said the subcontractor

on the "advice" of the respondent hired a union man against his wishes. The record on this point shows that the respondent simply passed on to the subcontractor information received from Ferguson that a local union would not permit the subcontractor to perform his contract unless he employed a union man; that the respondent "suggested if the prevailing conditions existed that way that it would probably be better if I did it, in order to keep the contract"; and that the subcontractor hired the union man (R. 233a, 234a, 268a). It is said that after the accident the respondent did not allow the subcontractor to complete his contract, engaged another tower company to finish the job, and thus "fired" the subcontractor. The statement is inaccurate. The record shows clearly that it was agreeable with the respondent for the subcontractor to complete the contract (R. 242a); that the subcontractor went home to Illinois to attend the deceased's funeral and while there made arrangements on his own with Tower Maintenance of Illinois, Inc., to complete the job (R. 243a); and that the latter agreed with the subcontractor to do the work for labor costs plus 20 percent (R. 250a). The petitioner asserts that the correspondence between the respondent and its subcontractor indicates a high degree of control. A review of the correspondence will disclose it indicates no control (R. 128a-130a; 153a-155a, 166a, 167a). It is said, correctly, that the respondent did not require a performance bond from its subcontractor. It is said that the paper which outlined the terms of the subcontract between the respondent and its subcontractor was headed "Construction Order" and not "Contract". While this is true the document would appear to be a classic example of an agreement between independent contractors (R. 145a-150a). Finally, the petitioner says that the subcontractor had never installed automatic lighting and had to find out from the respondent how to do it. The record shows that the information was supplied by means of plans (R. 154a).

CONCLUSION.

Wherefore, it is submitted that a writ of certiorari should not be granted.

Respectfully submitted,

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